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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 183

SIDNEY GANDELMAN,

Petitioner,

vs.

THE MERCANTILE INSURANCE COMPANY OF AMERICA AND THE RELIANCE INSURANCE COMPANY OF PHILADELPHIA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF AND MOTION TO CONSIDER AFFIDAVIT OF SIDNEY GANDELMAN AS A PART OF THE RECORD.

DON MARLIN,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	4
Questions presented	4
Reasons relied on for allowance of the writ	5
Brief in support of petition for certiorari	9
Opinion of Court below	9
Jurisdiction	9
Statement of the case	9
Specification of errors	10
Summary of argument	10
A. Respondents' policies were effective at the time of the fire even though not actually delivered to petitioner	11
B. There were material issues of fact to be tried, even though it is assumed the Court of Appeals correctly disposed of the rule of law set forth in Point A and a summary judgment was therefore improper	16
Motion to consider affidavit of Sidney Gandelman as part of record	23

Table of Cases Cited

Aetna Ins. Co. v. *Milling Co.*, 19 Fed. (2d) 177, 275 U. S. 541	11
Associated Press v. *United States*, 326 U. S. 1	7
Courdway v. *Insurance Co.*, 118 Cal. App. 530, 5 Pac. (2d) 453	5
Crawford v. *Transatlantic Fire Ins. Co.*, 125 Cal. 609, 58 Pac. 177	15
Doehler Metal, etc., Co. v. *U. S.*, 149 Fed. (2d) 130	22
El Dia Ins. Co. v. *Sinclair*, 228 Fed. 833, 241 U. S. 661	14
Erie Railroad v. *Tompkins*, 304 U. S. 64	5

Page

Feinberg v. *Ins. Co.*, 13 Cal. App. (2d) 370, 56 Pac. (2d) 1269 17
Ferrar v. *Western Assurance Co.*, 30 Cal. App. 489, 158 Pac. 609 19
Harrigan v. *Insurance Co.*, 128 Cal. 531, 58 Pac. 180 6
Hayward Lumber Co. v. *Lyders*, 139 Cal. App. 517, 34 Pac. (2d) 805 18
Helvering v. *Stuart*, 317 U. S. 154 7
Hill v. *Ind. Acc. Comm.*, 10 Cal. App. (2d) 178, 51 Pac. (2d) 1126 6
K. C. Working Chemical Co. v. *Ins. Co.*, 82 Cal. App. (2d) 120, 185 Pac. (2d) 832 11
Kleiber Motor Truck Co. v. *International, etc. Co.*, 106 Cal. App. 709, 289 Pac. 865 19
Meredith v. *Winter Haven*, 320 U. S. 228 7
Michigan Pipe Co. v. *Ins. Co.*, 52 N. W. 1074, 20 L.R.A. 277 11
New York Life v. *Rutherford*, 284 Fed. 707, 262 U. S. 745 13
Ragan v. *Merchants Transfer Co.*, 337 U. S. 530 7
Reitz v. *Mealey*, 314 U. S. 33 7
Schnell v. *Insurance Co.*, 42 Cal. App. (2d) 104, 109 Pac. (2d) 1018 5
Tarlton v. *De Veuve*, 113 Fed. (2d) 290 13
U. S. F. and G. Co. v. *Goldberger*, 13 Fed. (2d) 779 14
West v. *A. T. & T. Co.*, 311 U. S. 223 7

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Volume 53, p. 500 14
Volume 145, p. 1446 14

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California Annotations to 1 Restatement of the Law of Agency, Sec. 89 19
Cooley Briefs on Insurance, Vol. 1, p. 846 19

Page

Cornell Law Quarterly, Volume 18, p. 161 20
Corpus Juris Secundum, Volume 44, p. 1057, Sec. 265 14

Couch, Cyc. of Ins. Law:
Volume 1, p. 236, Sec. 127 15
Volume 2, p. 1361, Sec. 480 19

Rules of Civil Procedure, Rule 56 4
Rules of the Supreme Court of the United States, Rule 38 4
Restatement on Contracts, Section 64 15

United States Code, Title 28:
Section 1254 4
Section 1291 4
Section 1332 4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF AND MOTION TO CONSIDER AFFIDAVIT OF SIDNEY GANDELMAN AS A PART OF THE RECORD.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. Summary Statement of Matter Involved

This is an action at law upon two policies of fire insurance issued to Petitioner by respondent insurers and was brought in the District Court by reason of diversity of citizenship. Respondents filed motion for summary judgment (R. 16). The District Judge granted the motion

of respondents and entered judgment in favor of the respondents (R. 39).

Thereafter Petitioner appealed to the Court of Appeals for the Ninth Circuit (R. 40) and that Court affirmed the judgment of the District Court on March 12, 1951 (R. 48), filing at the same time its written opinion (R. 43). Petition for rehearing was denied on April 10, 1951 (R. 49).

The essential facts are as follows. This statement is substantially in accord with the facts as stated by the Court of Appeals in its opinion.

Petitioner owned and operated a furniture business in Los Angeles on which he carried fire insurance in the National Fire Insurance Co. through Agent Edward Oelsner, which policy had a limit of liability of $175,000.00. In the latter part of March, 1947, Petitioner verbally requested Oelsner to increase his insurance to $200,000.00 and Oelsner replied, "You're covered." (Mot. 30.) Oelsner was also agent for respondent insurers and on April 2, 1947 he contacted respondents and requested them to issue fire insurance policies totalling $25,000.00 in favor of Petitioner. Respondents thereupon, on April 2, 1947, each issued a policy dated April 2, 1947 in favor of Petitioner, the two policies totaling $25,000.00, and they thereupon each delivered their respective policies without restriction to Oelsner for delivery to Petitioner (R. 13-14; R. 7; R. 20). Meanwhile, the National Fire reduced its policy by endorsement to $70,000.00 (35% of $200,000.00) but at Oelsner's request agreed to bind an additional $105,000.00 (52½%) thus making the $200,000.00 requested by Petitioner (respondents 12½%—$25,000.00 and National 87½%—$175,000.00), (R. 30-31; R. 12-13; Mot. 30; R. 31).

On April 11, 1947, the insured property was destroyed by fire resulting in an admitted loss to Petitioner in the sum of $143,978.96 (R. 14). On May 17, 1947, with full

knowledge of the fire, Oelsner delivered respondents' policies to Petitioner without restriction and presented him with a bill for the premiums; Petitioner paid Oelsner the full amount of the premiums and Oelsner remitted the full amount thereof, less his commissions, to respondents who retained the same; at all times Oelsner and respondents had full knowledge of the National policy, the amount of the loss and all other pertinent facts (R. 14; Mot. 31; R. 22; Mot. 33). Eight months later (March 25, 1948) respondents tendered the premiums back to Petitioner and he refused the tender (R. 22). On June 15, 1948 Oelsner submitted to Petitioner a statement of account showing these policies were in effect from April 2, 1947, their date of issue, to March 25, 1948, their date of cancellation (Mot. 33). National disputed the amount of its liability to Petitioner and he entered into a compromise settlement of his claim against that company in the sum of $101,766.95 (Mot. 31, Mot. 32), and he then filed this suit against respondents for their pro rata share of the loss in the sum of $17,997.38.

The District Court granted respondents' motion for summary judgment. The Court of Appeals affirmed this judgment on the main ground that since the policies were not actually delivered to Petitioner prior to the fire, there was no binding contract in effect at the time of the fire, and hence the policies were not effective; also the Court of Appeals held that neither the delivery of the policies to Oelsner before the fire, the delivery of the policies to Petitioner after the fire, the acceptance thereof by Petitioner, nor the demand for and payment of the premium, raised any material issues of fact as to whether Oelsner in receiving the policies was acting for Petitioner, whether there was a ratification of the insurance by Petitioner after the loss, an estoppel of respondents to deny the delivery, or whether such facts constituted evidence

by way of admissions by respondents that the policies were in force at the time of the fire.

II. Jurisdictional Statement

The District Court had jurisdiction under Title 28, U.S.C.A., Sec. 1332; the Court of Appeals had jurisdiction under Title 28, U.S.C.A., Sec. 1291; and this Court has jurisdiction to grant certiorari under the provision of Title 28, U.S.C.A., Sec. 1254, and pursuant to Rule 38 of the Rules of this Court on the grounds that the Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions; and upon the further ground that the Court of Appeals has decided a federal question probably in conflict with applicable decisions of this Court; and has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III. Questions Presented

(1) The Court of Appeals has ruled that it is the law in California that where an insured places a verbal order for insurance with an insurer's agent and the agent requests the insurer to issue the policy, and the insurer issues the policy and delivers it to the agent without restriction for delivery to the insured, all prior to the loss, and thereafter a loss occurs, that such insurance is not effective unless the policy was also actually delivered by the agent to the insured prior to the loss. Such ruling is directly contrary to the law of California on this important question.

(2) District Courts are permitted to grant summary judgments only where there is no genuine issue as to a material fact (Rule 56, Federal Rules of Civil Procedure). Assuming the foregoing statement of California law by the Court of Appeals to be correct, there were still important

genuine issues of material fact before the District Court, as follows:

(a) In placing this insurance and receiving the delivery of the policy from the insurer, was not agent Oelsner acting for the insured?

(b) In any event did not the delivery of the policy to the insured, after the loss, with an effective date prior to the loss, coupled with a demand for and payment of the premium and receipt and retention thereof by the insurer, all with full knowledge of the loss, estop the insurer to deny that the insurance was in force at the time of the fire or at least constitute evidence of an admission of that fact by the insurer?

(c) Did not the acceptance of the policy and payment of the premium by the insured constitute a ratification of insurance placed for his benefit, which ratification is permissible even after loss?

IV. Reasons Relied On for Allowance of the Writ

(1) Under the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, it was the duty of the District Court to determine the substantive rights of the parties under California law. It may readily be demonstrated that the holding of the District Court as affirmed by the Court of Appeals is directly contrary to the law of California on this question.

The following California authorities directly hold that unrestricted delivery of an insurance policy to the insurer's agent prior to a loss for delivery to the insured, constitutes delivery to the insured so that the policy is effective upon such delivery to the insurer's agent regardless of its nondelivery to the insured prior to a loss:

Schnell v. *Insurance Co.,* 42 Cal. App. 2d 104, 109 Pac. 2d 1018;

Courdway v. *Insurance Co.,* 118 Cal. App. 530, 5 Pac. 2d 453;

Hill v. *Ind. Acc. Comm.*, 10 Cal. App. 2d 178, 51 Pac. 2d 1126;

Harrigan v. *Insurance Co.*, 128 Cal. 531, 58 Pac. 180;

14 California Jurisprudence 426, Sec. 12.

There are no California authorities which hold to the contrary or even suggest that the rule should be otherwise. In fact, as will be noted in Petitioner's brief filed herewith, the rule is universally, throughout the United States in both the state and federal courts, in accord with the California rule.

That the question involved is of great importance is readily apparent. This Court will take judicial notice of the method of transacting the insurance business throughout the United States. The insured, in practically every instance, *verbally* places his order with an insurance agent, who *verbally* replies, "You're covered," or words to that effect, exactly as was done here. The insured practically never specifies a particular company and the agent practically never mentions the name of the insurer in which the risk will be placed. The agent then places the risk with one of his companies, the company writes the policy and sends it to the agent for delivery to the insured, and the agent then delivers it to the insured. It is common knowledge that due to the tremendous volume of insurance business transacted, several weeks frequently transpire between the ordering of the insurance by the insured and the actual delivery of the policy to the insured.

Under the holding of the Court of Appeals, the insured is entirely without coverage during this entire period and until he actually receives the policy. It is submitted that a mere statement of this proposition demonstrates its importance and if this decision is to stand as the law, it will create great havoc and uncertainty for the insuring public and require that an entirely new method of insuring property be devised. It is respectfully submitted that such a

ruling is not and could not be the law in California, or elsewhere, and therefore such decision is in conflict with the California and the general rule and should not be permitted to stand.

While this Court will ordinarily accept the pronouncement of the court below as to local law, there is ample authority for the proposition that this Court will not hesitate to grant certiorari and apply local law upon an important question where the court below has not correctly pronounced the applicable law. This should be especially true where the court below has overlooked the state authorities on the question involved and cited as authority only a paragraph from the Restatement which does not touch upon the problem involved. Furthermore, the cases indicate that the weight to be given to the decision below as to local law may depend in some degree at least as to the experience of the members of the court below with respect to the law of the state in question. Without intending any disrespect, it may be noted that none of the three judges of the Court of Appeals practiced law in California, nor were they judges of any California Court, prior to their appointment to the Court of Appeals. In support of the foregoing, see:

Reitz v. *Mealey,* 314 U. S. 33;
West v. *A. T. and T. Co.,* 311 U. S. 223;
Meredith v. *Winter Haven,* 320 U. S. 228;
Helvering v. *Stuart,* 317 U. S. 154;
Ragan v. *Merchants Transfer Co.,* 337 U. S. 530.

(2) It has always been the policy of this Court and the federal courts generally to invoke Rule 56 with caution to the end that a litigant will not be deprived of his right to trial by jury.

Associated Press v. *United States,* 326 U. S. 1, 6.

If, as contended by Petitioner, there were genuine issues of fact to be tried, the granting of a summary judgment

would be contrary to the decisions of this court and other courts of appeal and would be contrary to the "accepted and usual course of judicial proceedings" and would justify certiorari. It is submitted that Rule 56 was never intended to sanction a summary judgment in a situation such as is presented by this record, and this Court should grant certiorari to the end that Petitioner may have his day in court and thus prevent a miscarriage of justice.

WHEREFORE, Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had herein, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Court of Appeals be reversed, and for such further relief as to this Court may seem proper.

Dated: July 3, 1951.

DON MARLIN,
Attorney and Counselor for Petitioner.

SUPREME COURT OF THE UNITED STATES

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No. 183

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THE MERCANTILE INSURANCE COMPANY OF AMERICA AND THE RELIANCE INSURANCE COMPANY OF PHILADELPHIA,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of Court Below

The opinion of the Court of Appeals is copied in the record herein at page 43.

II. Jurisdiction

This subject has been covered in the Petition filed herewith and the discussion therein is adopted as part of this brief.

III. Statement of the Case

The facts are sufficiently set forth in the Summary Statement of Matter Involved in the Petition filed herewith and the discussion therein is adopted as part of this Brief.

Specification of Errors

The Court of Appeals erred in holding that:

(1) The respondents' policies were ineffective because they had not been actually delivered to Petitioner prior to the fire.

(2) That there were no genuine issues of fact to be tried, and in granting respondents' motion for summary judgment.

Summary of Argument

(A) It is the law in California that where (1) an insured orders insurance from an insurance agent, (2) the agent places the order with an insurer, (3) the insurer accepts the order, (4) issues the policy, and (5) forwards the policy to the agent for delivery to the insured, all before loss, a valid insurance has been effected even though the agent does not deliver the policy to the insured prior to the loss. The Court of Appeal's decision to the contrary was error.

(B) There were material issues of fact to be tried even though it be assumed the Court of Appeals correctly disposed of the rule of law set forth in Point (A), and a summary judgment was not proper, where:

(1) The evidence presented was sufficient to support a finding that Agent Oelsner acted for Petitioner in receiving the policies from respondents.

(2) The possession of the policies by Petitioner was evidence of their delivery sufficient to take the case to the jury.

(3) The delivery of the policies after loss with effective dates prior to loss, and the demand for and payment of premium constituted evidence that the policies were in force at the time of the fire sufficient to take the case to the jury.

(4) Oelsner was acting for Petitioner in placing the insurance and Petitioner was entitled to ratify and accept the insurance after loss.

ARGUMENT

A. Respondents' Policies Were Effective at the Time of the Fire Even Though Not Actually Delivered to Petitioner.

It is submitted that every single circumstance essential to the validity of respondents' policies took place before the fire. These circumstances were (1) the ordering of the insurance by Petitioner from respondents' agent, (2) the placing of the order by respondents' agent with respondents, (3) the acceptance of the order by respondents, (4) the issuance of the policies by respondents with effective dates prior to the fire, and (5) unrestricted delivery of the policies by respondents to the agent for delivery to Petitioner. Identical transactions occur literally thousands of times daily in the United States and it has always been understood that a valid and effective insurance thereby resulted. If the Court of Appeals' decision is to stand, then such is not the case.

It may be conceded that if an agent represents several insurers there would be no enforceable contract of insurance against any particular insurer if the agent "fails to designate one of the companies *before a loss occurs.*" *K. C. Working Chemical Co.* v. *Ins. Co.*, 82 Cal. App. 2d 120, 185 Pac. 2d 832.

But it is well settled that once the agent designates the carrier the insurance is effected.

Aetna Ins. Co. v. *Milling Co.* (CCA, 6), 19 Fed. 2d 177 (cert. den. 275 U. S. 541);

Citing *Mich. Pipe Co.* v. *Ins. Co.* (Mich.), 52 N. W. 1074, 20 L. R. A. 277.

And, *a fortiori,* where, as here, the agent not only designates the carrier but the carrier actually accepts the risk and writes the policy, and delivers it to the agent for delivery to the insured, all before loss, there can be no question but that a valid insurance has been effected and the carrier is liable, regardless of the fact that the agent has not delivered the policy to the insured.

The following authorities amply establish that that is the general rule in California and throughout the United States, both in the state and federal courts:

Schnell v. *Ins. Co.*, 42 Cal. App. 2d 104, 109 Pac. 2d 1018

"Certainly there was constructive delivery, because the insurance carriers in sending the policy *to their agent* did not intend that he should keep it for them, but on the contrary he held it for the insured. This being the case, liability attached under the policy *when it was forwarded from the home office.*"

Courdway v. *Ins. Co.*, 118 Cal. App. 530, 5 Pac. 2d 453

"The delivery of the policy was accomplished by the act of sending it *to the agent* for delivery to the assured."

Hill v. *Industrial Acc. Comm.*, 10 Cal. App. 2d 178, 51 Pac. 2d 1126

"Moreover, it seems that if the insurer so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made or waived or is not a condition of the policy's taking effect, the contract is then complete, and the insurer cannot revoke acceptance, though the policy has not been delivered. Delivery is complete, therefore, when the policy is sent to the local agent to be unconditionally delivered and though lost on the way, it is nevertheless the property of the insured."

14 *California Jurisprudence* 426, Sec. 12

"Moreover, it seems that if the insurer so far accepts the application as to prepare and forward a policy *to its agent* for delivery, and if payment of the premium has been made or waived, or is not a condition of the policy's taking effect, the contract is then complete, and the insurer cannot revoke acceptance, though the policy has not been delivered."

Citing *Harrigan* v. *Ins. Co.*, 128 Cal. 531, 58 Pac. 180.

An examination of the policies (attached to the complaint) discloses that payment of the premium is not a condition of the policies taking effect; and in any event Agent Oelsner always extended credit to Petitioner and the premiums were paid upon demand (R. 22; Mot. 33).

The following authorities establish that the California rule is the general rule throughout the United States:

Tarlton v. *De Veuve* (CCA 9), 113 Fed. 2d 290 (a California case)

Policy was delivered to broker before fire, but insured did not know of existence of policy and it was not delivered to her until after the fire. "* * * In view of the general rule that a delivery *to the agent* is a delivery to the insured, it has been held in numerous cases that the delivery is sufficient to give effect to the insurance, *though the agent retains the policy* * * * *and the policy is not, in fact, actually given into the possession of the insured before loss.*"

New York Life v. *Rutherford* (CCA 9), 284 Fed. 707 (Cert. den., 262 U. S. 745)

"In brief, the rule sustained by the weight of authority is that, even where the insurance contract requires delivery of the policy as a condition precedent to liability, the receiving of the policy *by the agent* for unconditional delivery will be taken as equivalent to delivery to the applicant if the contract has been otherwise consummated."

El Dia Ins. Co. v. *Sinclair* (CCA 2), 228 Fed. 833 (Cert. den., 241 U. S. 661)

"Indeed, the courts have held that a policy drawn up and signed by the proper officers wants no further delivery. It is a valid policy as soon as signed, and becomes then the property of the insured, and is held by the insurer for his use."

To the same effect, see also:

U. S. F. and G. Co. v. *Goldberger* (CCA 3), 13 Fed. 2d 779.

44 *C. J. S.* 1056, Sec. 265

"Delivery of the policy *to the agent* or broker through whom the application was made for unconditional transmission to insured without any further action on the part of insured being necessary except the mere formal act of receiving the policy *is equivalent in law to a delivery to him, although he did not know that a policy had issued . . . or the property insured is destroyed before delivery by the agent to insured.*"
(Citing *Tarlton* v. *De Veuve, supra* [CCA 9, 113 Fed. 2d 290].)

53 *A. L. R.* 500

"A transmission of an insurance policy *to the agent of the insurance company* has been held a delivery to the applicant, notwithstanding a clause in the policy requiring a delivery, or an actual delivery, to the applicant in order to effect insurance." Citing many cases, including *New York Life Ins. Co.* v. *Rutherford, supra* (CCA 9, 284 Fed. 707).

145 *A. L. R.* 1446

"A great number of cases deal with the question whether a transmission of an insurance policy *to the agent of the insurer* amounts to a delivery to the applicant. *It may be stated as a general rule, supported by the great majority of cases, that such a transmis-*

sion is a constructive delivery to the applicant. * * *"*
(Citing many cases.)

1 *Couch, Cyc. of Ins. Law,* 236, Sec. 127

"Where a policy of insurance does not expressly stipulate for actual manual delivery to the insured as an essential to its effectiveness, unconditional delivery to the agent for delivery to the insured is sufficient."

1 *Appleman on Ins. Law,* 127, Sec. 134

"Where * * * the policy is sent unconditionally *to the company's agent* to deliver the contract to the insured, the possession of the agent is that of the insured and no actual manual delivery is necessary to bind the insurer to the risk * * *."

P. 131, Sec. 136—"* * * Where there is no provision in the policy postponing its effective date until date of delivery, it is the rule that, as soon as the application is accepted by the insurer the policy is effective, and this notwithstanding the death of the insured prior to delivery."

In reaching a contrary conclusion, the Court of Appeals cites as authority only Sec. 64 of the Restatement of Contracts. A reading of the cited paragraph discloses that it has nothing to do with the question of insurance, and is not contrary to the foregoing authorities. Nor is the case of *Crawford* v. *Transatlantic Fire Ins. Co.,* 125 Cal. 609, 58 Pac. 177, cited by the Court of Appeals in any way contrary to Petitioner's position, as witness the following quotation from that case:

"If the policy—as the evidence for plaintiffs tended to show—was the memorial of a contract which in its essentials had been agreed upon *by parol* before the fire, and which the parties intended should take effect according to its terms on the 2nd of May at noon, then certainly the subsequent delivery was sufficient to make

> the defendant liable on the instrument; its liability thereon probably attached even without actual delivery to the insured or his agent."

And, *a fortiori,* where the written policy was actually issued prior to the fire, the insurer's liability must be held to have attached.

B. There Were Material Issues of Fact to Be Tried, Even Though It Be Assumed the Court of Appeals Correctly Disposed of the Rule of Law Set Forth in Point A and a Summary Judgment Was Therefore Improper.

(1) The evidence presented was sufficient to support a finding that Oelsner was acting as Petitioner's agent in receiving the policies from respondents.

44 *C. J. S.* 1057, Sec. 265

> "Generally, an agent of the company who receives a policy for unconditional delivery to insured is deemed an agent or trustee of insured to receive the policy for him, and his possession is regarded as the possession of insured."

29 *Am. Jur.* 167, Sec. 152

> "• • • It has been deemed that *an insurance* agent, receiving a completed policy sent him by his principal for unconditional delivery to the insured, acts as the agent of the latter for the purpose of making delivery to him."

And to the same effect see the authorities cited under Point A, *supra.*

(2) The possession of the policies by Petitioner is *prima facie* evidence of their delivery and the burden was on the insurer to overcome the presumption, and whether it did is a fact question for a jury to determine.

Feinberg v. *Ins. Co.*, 13 Cal. App. 2d 370, 56 Pac. 2d 1269

"The possession of the policy by the insured * * * is prima facie evidence of its delivery as a valid and subsisting contract and the burden of overcoming the prima facie case made by production of the policy by the plaintiff, in an action to enforce it, rests upon the insurance company. Whether the defendant's evidence did or did not overcome the prima facie case thus made by the plaintiff *was for the jury to determine.*

Tarlton v. *De Veuve* (CCA, 9), *supra* [113 Fed. 2d 290]

"The burden rested upon appellant (insurance company) to establish its defense that the delivery of the policy was a conditional delivery. * * * The insured's possession of a policy creates a presumption of proper delivery after performance of all conditions precedent."

(3) The delivery of the policies after loss, with effective dates prior to loss, with a demand for and payment of the premium estop respondents to deny that the policies were effective at the time of loss, or at least constitute an admission by respondents that the policies were in force, which admission is evidence sufficient to take the case to the jury.

Hill v. *Industrial Accident Comm.*, 10 Cal. App. 2d 178, 51 Pac. 2d 1126

"The most conclusive evidence that the policy had been delivered, that credit had been extended Hill and that the policy was in full force and effect up to March 14, 1934, is the determined effort of the company to collect the earned premium up to that date and after the injury of Mrs. Vickers and after it had been fully advised of all of the facts of the case. *This is an admission on its part that the policy had been delivered,* for without its delivery no part of the premium could have been earned. It is also an admission that credit had been extended to Hill at least to March 14, 1934. *It is also an admission that the policy was in full force and effect up to that date.*"

(4) Oelsner was acting for Petitioner in placing this insurance and Petitioner was entitled to ratify it and accept it even though he did not learn of its issuance until after the loss.

It is undisputed that after the loss occurred and when Oelsner and each of the respondents had full knowledge of all of the facts, Oelsner delivered the policies to Petitioner without any restriction whatsoever on said delivery, and without any request by either of the respondents that said delivery not be made; and Petitioner accepted said policies, and within the time required filed proofs of loss thereon. Under California law, insurance issued without the knowledge of the insured may nevertheless be ratified and accepted by him when the same comes to his knowledge, even though this be after the loss, and such ratification and acceptance is sufficiently indicated by filing proof of loss under the policy.

Hayward Lumber Co. v. *Lyders,* 139 Cal. App. 517, 526, 34 Pac. 2d 805

> "In the circumstances recited appellant invokes the principle laid down in Civil Code, section 1559, that 'a contract made expressly for the benefit of a third person, may be enforced by him,' and the rule that 'one may become a party to an insurance effected in terms applicable to his interest, *without previous authority from him,* by adopting it either before or after the loss has taken place,' citing *Hooper* v. *Robinson,* 98 U. S. 528 (25 L. Ed. 219); *Kleiber Motor Truck Co.* v. *International Indemnity Co.,* 106 Cal. App. 709, 716 (289 Pac. 865), and *Phoenix Ins. Co.* v. *Hancock,* 123 Cal. 222, 224 (55 Pac. 905), where it is said: 'Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act—even after the occurrence of a loss.' "

Kleiber Motor Truck Co. v. *International etc. Co.,* 106 Cal. App. 709, 716, 289 Pac. 865

"Even if it be held that no particular authority to take out this definite insurance is here shown, still, under the authorities it was made valid by the ratification of the Kleiber Motor Truck Co. subsequent to the loss."

Ferrar v. *Western Assurance Co.,* 30 Cal. App. 489, 159 Pac. 609

"But even if Coleman were not the general agent for the assured, still the finding of the court as to his authority would have to be sustained on the theory that his action in procuring the policy in the defendant company was ratified by his principal. In filing her claim of loss and demanding payment, she ratified the action of her agent. The authorities seem to hold that a ratification, though made subsequent to a loss, is valid."

2 *Couch Cyc. of Ins. Law,* 1361, Sec. 480

"If a party insures for another as principal *without the latter's prior authority or consent, the* intended principal may, if the principal has not previously withdrawn from the contract, adopt and ratify the unauthorized act, in which case the ratification is equivalent to a prior authority, *and this, according to the weight of authority, even after loss* * * *." (citing many cases, including *Ferrar* v. *Western Assurance Co.,* supra.

1 *Cooley Briefs on Insurance,* 846

" * * * but where one, though not duly authorized, assumes to act as agent for another, and in his name procures a fire insurance policy on property which is subsequently burned, the person in whose name the policy has been issued may ratify the assumed agency and accept liability against the insurer to the same extent as if authority had been originally conferred."

California Annotations to 1 Restatement of the Law of Agency, Sec. 89:

"However, the courts (California) have allowed a ratification of unauthorized insurance contracts even

after loss and knowledge thereof." (citing *Ferrar* v. *Western Assurance Co.*, supra, and *Kleiber Motor Truck Co.* v. *International etc. Co.*, supra.

Attention is also called to an exhaustive article in *18 Cornell Law Quarterly 161* on this precise question, wherein the author reviews practically all of the English and American cases on the question and points out (p. 173) that California clearly permits ratification of an unauthorized policy after loss.

The Court of Appeals seeks to deny Petitioner the benefit of this rule solely because Petitioner has "conceded" that Oelsner was acting as agent for respondents and ratification can only occur, says the Court, where one has purported to act on behalf of another. The Court is referring to the portions of the stipulation of facts where it is stated that Oelsner was respondents' agent and performed certain acts as such agent; and also to the statement that no one acting for Petitioner had knowledge of the issuance of respondents' policies until after the loss. But in so doing, the Court overlooked all of the other facts and inferences flowing therefrom which were also before the Court from which it could be concluded that Oelsner (even though he was respondents' agent) was acting for Petitioner (indeed, could only have been acting for Petitioner) in the essential matters here involved. These facts include the long course of dealing between Oelsner's office (which represented many insurers) and their "client" (Petitioner) (R. 17; R. 31); the method of placing insurance over the years, the selection of the company or companies to carry the risk being left entirely up to Oelsner (R. 28-29); the attempt of Oelsner to replace Petitioner's insurance in numerous companies (including several he was not even agent for) when National indicated a desire to reduce its coverage (R. 31); the ordering of the $25,000.00 increase by Petitioner, the acceptance of the order by Oelsner at a

time when he was obviously not acting for respondents, the determination of Oelsner to offer the business to respondents, and the subsequent delivery of the policies by respondents to Oelsner for delivery to Petitioner (see Statement of Facts in Petition). These facts definitely establish that Oelsner was acting for Petitioner in placing Petitioner's order for this insurance and in receiving delivery of the policies from respondents.

It is clear that the "concessions" referred to by the Court were only intended to establish what they state, viz. that Oelsner was the agent for respondents. It would do violence to the language and intent thereof to construe the stipulation so as to deprive Petitioner of the right to claim the benefit of the inferences and resulting legal relationships which would normally flow from the other facts before the Court. The cases heretofore cited establish that in the situation here existing, the insurer's agent is "deemed" to be acting for the insured in placing an order for insurance and in receiving delivery of the policy from the insurer for delivery to the insured. It is the general rule that it is a fact question as to whether an insurance agent is acting for the insured at any particular point in the transaction:

> *Mich. Pipe Co.* v. *Ins. Co.* (Mich.), 52 N. W. 1074, 20 L.R.A. 277 (cited with approval in *Aetna Ins. Co.* v. *Milling Co.* (CCA, 6), 19 Fed. 2d 177 (cert. den. 275 U. S. 541)).

It is submitted that it was not proper on motion for summary judgment to rule as a matter of law that there were no fact issues because of the alleged "concessions" in the stipulation, where the other facts which were also before the Court definitely establish that there were genuine issues of fact requiring a trial on the merits. Neither the stipulation nor the law require or justify any such result.

(5) Where there are genuine issues of fact it is error to grant a motion for summary judgment.

Associated Press v. *U. S.*, 326 U. S. 1, 6

"The Court of Appeals correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, *where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut off litigants from their right of trial by jury if they really have issues to try.*"

Doehler Metal etc. Co. v. *U. S.* (CCA, 2), 149 Fed. 2d 130

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial *where there is the slightest doubt as to the facts,* and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered."

It is submitted that the determination of this important question of local law contrary to the law of California and the granting of respondents' motion for summary judgment when there were genuine issues of fact to be determined justify the granting of certiorari in this case to the end that Petitioner may have a trial of his case on the merits before a jury. To deny the petition will perpetuate a miscarriage of justice.

Respectfully submitted.

DON MARLIN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 183

SIDNEY GANDELMAN,

Petitioner,

vs.

THE MERCANTILE INSURANCE COMPANY OF AMERICA, ET AL.,

Respondents

MOTION TO INCLUDE AFFIDAVIT OF SIDNEY GANDELMAN IN RECORD ON PETITION FOR WRIT OF CERTIORARI.

Now comes Petitioner, Sidney Gandelman, by and through his attorney and counsellor, Don Marlin, and moves this Court to consider the Affidavit of Sidney Gandelman, dated December 14, 1949, a copy of which is attached hereto and marked "Exhibit A", as part of the Record on Petition for Writ of Certiorari herein.

Said motion is made upon the grounds that said affidavit was submitted by petitioner in opposition to respondents' Motion for Summary Judgment in the District Court, and was considered by said District Court in granting respond-

ents' said motion, was further considered by the Court of Appeals in affirming said Judgment; and a consideration of said affidavit is essential to the disposition by this Court of the Petition for Writ of Certiorari.

That said affidavit was required by respondents' counsel to be omitted from the Record on Certiorari herein as a condition to entering into "Stipulation for Omission of Unessential Portions of the Record on Petition for Writ of Certiorari", under conditions and circumstances that required counsel for Petitioner to agree thereto in order to have Petition for Certiorari filed with this Court within the time required, and under conditions that justify this Court in considering said affidavit as part of the record herein, as appears from the Affidavit of Don Marlin filed herewith.

Wherefore, Petitioner prays that this Court make an appropriate Order for Inclusion of said Affidavit of said Sidney Gandelman in the Record herein, or that it consider said Affidavit in disposing of said Petition for Writ of Certiorari herein.

DON MARLIN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 183

SIDNEY GANDELMAN, *Petitioner,*

vs.

THE MERCANTILE INSURANCE COMPANY OF AMERICA, ET AL., *Respondents*

AFFIDAVIT OF DON MARLIN IN SUPPORT OF MOTION FOR INCLUSION OF AFFIDAVIT OF SIDNEY GANDELMAN.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Don Marlin, being first duly sworn, deposes and says:

1. That he is the attorney and counsellor for Petitioner, Sidney Gandelman, and makes this affidavit on his behalf;

2. Petition for Rehearing was denied by the Court of Appeals of the Ninth Circuit on April 10, 1951, and the said Court of Appeals stayed the Mandate of that Court to and including July 8, 1951, which date was, therefore, the last day on which Petition for Certiorari could be filed in this Court;

3. That on or about April 18, 1951, the Clerk of the United States Court of Appeals for the Ninth Circuit forwarded to the Clerk of this Court the Transcript of the Record herein, being one hundred seventy-seven (177) pages in length; that thereafter, and on or about the 23rd day of May, 1951, your affiant telephoned from Los Angeles, California to Mr. E. P. Cullinan, an Assistant to the Clerk of this Court, and asked him for an estimate of the cost of printing said Transcript, and was advised by said Mr. Cullinan that the cost of printing said Tran-

script and Petition and Brief for Certiorari would exceed twelve hundred dollars ($1,200.00);

4. Said petitioner had and has little or no assets or property, and was unable to raise said sum for printing of said record; that the judgment which is involved on the Petition for Certiorari was rendered on Respondents' Motion for Summary Judgment and, in the opinion of your affiant, said Petition for Certiorari could be properly and adequately disposed of by this Court on a record consisting substantially of the pleadings and the affidavits considered by the District Court on the Motion for Summary Judgment, which affidavits included the affidavit of Petitioner in opposition to said Motion and the affidavit of one Edward Oelsner submitted by Respondents in support of their Motion for Summary Judgment; that by so restricting the record, affiant determined that the cost thereof could be limited to approximately $580.00; and Petitioner informed your affiant that if given sufficient time, he felt he could raise the sum of approximately $580.00 for said purpose;

5. On May 23, 1951, your affiant contacted Mr. Eugene Davis, counsel for Respondents, and asked him to enter into a Stipulation for omission of unessential portions of the Record on Petition for Certiorari, and Mr. Davis advised your affiant that if your affiant would present his proposed Stipulation, together with draft of Petition for Certiorari and Brief in support thereof, that said Mr. Davis would consider the matter and advise your affiant whether he would enter into said Stipulation; that on or about June 8, 1951, your affiant submitted to the said Mr. Davis the proposed Stipulation for Omission of Unessential Portions of the Record, together with copies of the Petition for Writ of Certiorari and Brief in support of Petition for Writ of Certiorari; and your affiant requested Mr. Davis to give him an early decision with respect thereto so that the necessary documents could be filed with this Court within the time required, and Mr. Davis said he would examine the documents and give your said affiant an early answer with respect thereto;

6. That thereafter your affiant received no word from the said Mr. Davis with respect to said Stipulation, and your affiant then called the office of the said Mr. Davis

repeatedly, requesting a decision thereon, and was informed on various occasions that Mr. Davis was out of the city, or engaged in court trials, and would call your affiant;

7. That sometime in the latter part of June, 1951, Mr. Davis called your affiant and said he would sign said Stipulation if certain changes were made therein, but he did not include among said changes the omission of the Affidavit of Sidney Gandelman; that your affiant immediately redrafted said proposed Stipulation and again delivered it to Mr. Davis for execution, requesting his immediate attention thereto, since Petition for Certiorari was required to be filed with this Court not later than July 8, 1951;

8. Not having heard from Mr. Davis on July 3, 1951, your affiant went to the office of Mr. Davis and requested of Mr. Davis that he immediately execute the said Stipulation, and your affiant then and there stated to the said Mr. Davis that he had to forward the Petition for Writ of Certiorari and the Stipulation to Washington, D. C. that day, or it would be too late; that thereupon, Mr. Davis informed your affiant that he would only sign said Stipulation provided that there was stricken from the said Stipulation the provision that the Affidavit of Sidney Gandelman was to be included in the Record for Petition for Certiorari; and that your affiant then stated to Mr. Davis that he left your affiant no choice but to accede to his demand and that he would have to present the matter to the Court at the proper time for a decision as to whether said Affidavit would be considered; that thereupon, the said Mr. Davis struck out, in his own handwriting, the said reference in the Stipulation to the Affidavit of Sidney Gandelman and initialed the same, and requested your affiant to initial the same, which your affiant then and there did.

9. That your affiant thereupon immediately left the said Mr. Davis's office and returned to his own office, and upon the said July 3, 1951, mailed to the Clerk of this Court the original Petition for Writ of Certiorari, the Brief in support of said Petition, and the said Stipulation, and a check for $150.00.

10. That thereafter, the Clerk of this Court advised your affiant that he would require an additional $430.00, making

a total of $580.00, to cover the cost of the printing of the Record, Petition and Brief of Certiorari herein.

11. That your affiant immediately contacted Petitioner and requested him to make every effort to raise the sum of $430.00 at the earliest possible date, and Petitioner said he would do so.

12. That your affiant thereupon filed with this Court, on or about July 6, 1951, an Application for Extension of Time to Deposit the said $430.00, setting forth in said Application the financial and physical condition of the Petitioner, and the reason for the need for said additional time to raise said money, and on July 9, 1951, the Honorable Robert H. Jackson, Associate Justice of this Court, made an Order granting Petitioner an extension of time within which to deposit said fund with the Clerk of this Court.

13. That thereafter, Petitioner raised the said sum of $430.00, which has been paid to the Clerk of this Court;

14. That in preparing Petition for Certiorari and Brief in support thereof, affiant referred to said Affidavit of Sidney Gandelman upon the assumption that the same would be included in the Record herein, and without the inclusion of the same the said Petition and Brief will be inadequate.

15. That your affiant is of the opinion that the circumstances surrounding the execution of said Stipulation are such that, in the interests of justice, this Court should include the Affidavit of Sidney Gandelman in the Record herein, and should consider said Affidavit in disposing of the Petition for Writ of Certiorari.

DON MARLIN,
Affiant.

[SEAL.]

Subscribed and sworn to before me on this 10th day of September, 1951.

H. WM. HESS,
Notary Public in and for
the County of Los Angeles,
State of California.

DON MARLIN,
Suite 1030, 510 West Sixth Street,
Los Angeles 14, California,
VAndike 3193,
Attorney for Plaintiff.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 8185-B.H.

SIDNEY GANDELMAN, *Plaintiff*,

vs.

THE MERCANTILE INSURANCE COMPANY OF AMERICA, a corporation, and THE RELIANCE INSURANCE COMPANY OF PHILADELPHIA, a corporation, *Defendants*

AFFIDAVIT OF SIDNEY GANDELMAN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Sidney Gandelman being first duly sworn, deposes and says:

That he is the plaintiff herein and makes this affidavit in support of his motion for Summary Judgment.

1. At all times herein mentioned, Edward Oelsner (hereinafter referred to as Oelsner) was the duly authorized agent for each defendant, and for National Fire Insurance Company (hereinafter referred to as National).

2. At all times herein mentioned, affiant owned and operated a furniture business at 145 South Anderson Street, Los Angeles, California, and, from time to time, purchased furniture in large quantities, and as a result had fluctuating and varying amounts and values of stock on hand at said location.

3. On or prior to October 1, 1946, affiant requested Oelsner to issue to him a provisional reporting form fire insurance policy covering his stock of furniture at said location with a limit of liability of $175,000.00; and on said date, said Oelsner did issue and deliver to affiant Policy No. 281655 of National, being a provisional reporting form fire insurance

policy insuring plaintiff's stock of goods with a limit of liability of $175,000.00.

4. Thereafter, and until the fire hereinafter referred to, affiant spoke to said Oelsner or his office staff from time to time, and advised said office of the approximate value of his stock on hand.

5. During February and March, 1947, affiant purchased large quantities of furniture and in the latter part of March, 1947, affiant requested of said Oelsner that he increase the amount or limit of liability of affiant's fire insurance from $175,000.00 to $200,000.00, and the said Oelsner thereupon stated to affiant "You are covered".

6. On or about April 3, 1947, and without affiant's knowledge, said Oelsner issued an endorsement for attachment to said National policy, changing the coverage thereunder from 100% of $175,000.00 to 35% of $200,000.00.

7. On or about April 2, 1947, and without affiant's knowledge, said Oelsner, with knowledge and express authority of defendants, and each of them, and as the agent of said defendants, did issue provisional reporting form fire insurance policy No. 280973 of defendant Mercantile in favor of affiant, and insuring said stock of goods in an amount not to exceed 5% of $200,000.00, and did issue provisional reporting form fire insurance policy No. PF804647 of defendant Reliance in favor of affiant and insuring said stock of goods in an amount not to exceed 7½% of $200,000.00.

8. Oelsner thereupon and without affiant's knowledge requested National, and said National agreed, to bind the remainder of said risk, namely, 52½% of $200,000.00; so that National had 35% plus 52½% or a total of 87½% of said risk, and defendants a total of 12½% thereof, making 100% in all.

9. On April 11, 1947, affiant's stock of furniture was damaged by fire.

10. Immediately after said fire, defendants and National employed Adjuster George Lauer to adjust said loss; at all times herein mentioned said Lauer knew of the issuance of defendants' policies as alleged in paragraph 7 hereof, and knew that he represented defendants but failed to advise affiant of the issuance or existence of the policies of de-

fendants and informed affiant that he was representing only National.

12. Affiant saw and spoke to said Oelsner frequently after said fire and prior to May 17, 1947, but said Oelsner entirely failed to inform affiant of the issuance or existence of said policies of defendants or the transactions with National, all as alleged in paragraphs 6, 7 and 8 hereof, until about May 17, 1947; on said date, said Oelsner informed affiant of the facts set forth in Paragraphs 6, 7 and 8 hereof, and delivered to affiant said policies of defendants, certain documents, and premium statements for each of said policies of defendants. At all times herein mentioned, defendants and each of them had knowledge of all of the facts hereinabove referred to, and at no time did either of defendants request Oelsner not to deliver said policies to affiant or not to bill affiant for the premiums thereon.

12. On June 9, 1947, affiant entered into an agreement with said Lauer acting for defendants and National, fixing the loss and damage to his said merchandise in the sum of $143,978.96.

13. Shortly after said fire, a dispute arose between affiant and National, as to the amount of its liability to affiant; and thereafter several meetings were held at which were present affiant, Oelsner, Lauer and William H. Levit, attorney for National, and other meetings at which were present affiant and said Levit; at said meetings said National acting through said Lauer and Levit, refused to admit that it was liable to affiant for more than 35% of said loss, or approximately $50,000.00, and affiant and said Oelsner asserted that said National was liable for 87½% of said loss, or approximately $125,000.00, and defendants for the balance thereof, namely, 12½% of said loss, or approximately $18,000.00; that at said meetings, the question of affiant's failure to file written reports of value with National was discussed, and affiant and Oelsner asserted that the policy provision relating to written reports of values was waived by National because Oelsner had verbally informed National of such values shortly before the fire; all of said meetings were entirely in the nature of discussions for settlement and compromise, and as a result thereof, affiant and National ar-

rived at a compromise of their dispute whereby said National agreed to pay affiant $101,766.95 in compromise and settlement of affiant's claims, and said compromise agreement was reduced to writing, a copy thereof being attached hereto and marked Exhibit A; during the entire period of said discussions, affiant stated that in discussing settlement with National, he was not intending to waive his rights against defendants under their said policies; at one or more of said meetings, said Levit announced that he was authorized by defendants to try to also settle affiant's claim against defendants; and certain discussions were had between affiant and said Levit concerning a complete settlement of his claims against National and defendants; that affiant rejected the offers of compromise submitted by said Levit as to his claims against defendants, and it was thereupon stated by affiant to said Levit, that he would only settle his claim against National, and that he would not settle his claims against defendants, but was specifically reserving his rights against defendants; at no time did affiant elect or state to anyone that he was electing to claim under the National policy and not under defendants' policies, but on the contrary, since May 17, 1947, affiant has asserted his right to claim under the policies of defendants as well as the National policy; at the time of the execution of said compromise agreement (Exhibit A) said Levit presented to affiant for execution, a document entitled "Proof of Loss"; affiant asked said Levit what said document was and said Levit stated that the said document was required by National for its records and had nothing to do with the defendant companies; that affiant stated to said Levit that it was understood that he was not settling his claim against defendants under their policies, and said Levit replied that it was so understood, and affiant thereupon signed said "Proof of Loss" without reading it, and then signed said compromise agreement (Exhibit A); that said Levit did not read said "Proof of Loss" to affiant; that it is not true that said National paid affiant 100% of his liability under its policy; that as set forth above, said payment was stated to be and actually was a settlement and compromise of a disputed claim against National.

14. As hereinabove stated, when Oelsner delivered said policies of defendants to affiant on May 17, 1947, he also delivered to affiant premium statements for each of said policies, and affiant thereupon paid the full amount of said premiums to said Oelsner; and said Oelsner thereupon remitted said premiums, less his commissions thereon, to defendants; and defendants accepted and retained said premiums with full knowledge of all of the circumstances hereinabove set forth.

15. On June 15, 1948, Oelsner submitted to affiant a written statement of account covering all insurance and the premiums thereon written by said Oelsner for affiant, wherein it was stated as follows:

Date Effective	Expiry	Company	Policy Number	Coverage	Dr.	Cr.
4-2-47	4-2-48	Reliance	PFS04647	Provisional Reporting	$287.95	
	3-25-48	Canc.	"			$287.95
4-2-47	4-2-48	Mercantile	280973	Provisional Reporting	115.17	
	3-25-48	Canc.	"			115.17

that affiant immediately advised said Oelsner that he would not accept a refund of said premiums on said policies of defendants, which said premiums had been retained by said Oelsner and defendants for a year with full knowledge of the facts.

16. Under the terms of the policies issued by defendants to affiant, no reports of values were due thereunder until the last day of April, 1947, and such reports would not be delinquent for thirty days thereafter; and since the fire occured on April 11, 1947, and said policies were written effective April 2, 1947, no reports were due or delinquent thereunder at the time of said fire.

SIDNEY GANDELMAN

Subscribed and sworn to before me this 14th day of December, 1949.

DON MARLIN

Notary Public in and for said County of Los Angeles, State of California. (Seal.)

RELEASE

Release, executed by Sidney Gandelman, individually and doing business as New York Furniture Co., in favor of National Fire Insurance Company of Maryland, a corporation.

Recitals:

A. Sidney Gandelman, doing business as New York Furniture Co. is named as the assured in and by policy of fire insurance No. 281653, issued by National Fire Insurance Company of Hartford, being for the term of one year from October 1, 1946, and being a provisional reporting policy covering on property described and at the locations specified in said policy, being for the provisional amount of $100,000.00, with a limit of liability in the sum of $175,000.00.

B. On or about April 11, 1947, a fire occurred which damaged or destroyed all of the property described in said policy, said loss being in the amount of $143,978.96.

C. A dispute has arisen between the parties hereto as to the amount of liability of the National Fire Insurance Company under said policy or otherwise by reason of said fire.

D. It is intended hereby to fully compromise and settle all claims and demands of every nature whatsoever of the undersigned against National Fire Insurance Company of Hartford, arising or to arise out of or under said policy of insurance or otherwise by reason of said fire or otherwise or at all, including all claim for return premium under said policy, if any.

It is agreed:

In consideration of the payment by National Fire Insurance Company of Hartford of the sum of $101,766.95, receipt whereof is hereby acknowledged by the undersigned, the undersigned does hereby fully release, acquit and discharge National Fire Insurance Company of Hartford from any and all liability for loss by fire, return premium or otherwise arising out of or by reason of any of the facts herein set forth, or arising out of or by reason of any other facts whatsoever, including any and all liability under the said policy of insurance or otherwise, and the undersigned does

further agree to forthwith surrender said policy to said insurance company and to execute and deliver to said insurance company upon demand such other releases and documents as may be desired by said insurance company to effectuate the purposes hereof.

IN WITNESS WHEREOF, the undersigned has caused this Release to be duly executed at Los Angeles, California, this 16th day of July, 1947.

SIDNEY GANDELMAN,
Individually and doing business
as New York Furniture Co.

(7174)